ECONPILE (M) SDN BHD v. ASM DEVELOPMENT (KL) SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
[CIVIL APPEAL NOS: 02(f)-2-01-2023(W) & 02(f)-34-05-2023 (W)]
21 MARCH 2024

Abstract – *An adjudication decision after having been enforced pursuant to s. 28 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') as an order of the court cannot be stayed pursuant to s. 16(1)(b) of the CIPAA. The parties to an adjudication have no option but to comply with the orders of the adjudication decision unless, and only unless, it has been set aside under s. 16 of the CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of CIPAA.*

CONSTRUCTION LAW: *Adjudication decision – Stay – Application for – Application for stay under s. 16 of Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Whether stay could be granted under s. 16(1)(b) after adjudication decision enforced under s. 28 of CIPAA as order of court – Whether granting of stay would be in excess of jurisdiction when adjudication decision remained intact and not set aside – Whether orders of adjudication decision ought to be complied with – View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd*

The appeals herein raised questions of significance relating to an application for a stay under s. 16 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') in particular whether a stay can be granted under s. 16(1)(b) of the CIPAA after the adjudication decision was enforced under s. 28 of the CIPAA as an order of the court. By a letter of award, ASM Development (KL) Sdn Bhd ('ASM') appointed Econpile (M) Sdn Bhd as its main contractor to carry out works for a project ('project') for a contract sum of RM280 million. Econpile commenced works and submitted 27 progress claims to ASM in respect of the works done. ASM contended that Econpile failed to perform their work diligently according to the terms of the contract which resulted in delays in the completion of the project. The architect involved in the project issued a certificate of non-completion to Econpile notifying of the imposition of the liquidated damages. Disputes arose between the parties resulting in Econpile commencing adjudication proceedings against ASM claiming for the uncertified interim valuations nos. 16 to 24 and alleged undercertification of interim valuation no. 15. Partial payment was made for interim payment certificate no. 15, and no certificates were issued for progress claims nos. 16 to 24. Econpile then

initiated adjudication under the CIPAA to claim the sums under progress claims nos. 16 to 24, as well as the undercertified sum under interim payment certificate no. 15. ASM made a cross-claim. Econpile simultaneously commenced arbitration proceedings by way of a notice of arbitration. ASM disputed the sums claimed in the said notice and subsequently issued its notice of arbitration. By the adjudication decision and a supplementary adjudication decision ('first adjudication decision'), the adjudicator decided that ASM was to pay Econpile RM59,767,269.32 ('adjudicated sum'). Unfortunately, ASM failed to pay the said adjudicated sum which subsequently led to Econpile issuing a statutory demand pursuant to s. 466(1) of the Companies Act 2016. Econpile filed a notice of application ('OS 113') to enforce the adjudication decision pursuant to s. 28 of the CIPAA ('first enforcement application'). ASM responded by filing two applications: (i) in OS 118, an application to set aside the said adjudication decision under s. 15(b) and (d) of the CIPAA on the basis that there has been a denial of natural justice and that the adjudicator had acted in excess of his jurisdiction ('first setting aside application') and (ii) in OS 173, an application to stay the adjudication decision pending the conclusion of the arbitration on the basis that there were clear and unequivocal errors in the adjudication decision as the parties have referred the disputes to arbitration. ASM contended that there was a genuine and valid set-off in their counterclaim of RM276,581,893.96 against Econpile in the arbitration proceeding, which exceeded the adjudicated amount of RM59,767,269.32 ('first stay application'). In respect of the first adjudication decision, three applications were heard together before the High Court, OS 113, OS 118 and OS 173. The High Court, in finding that there were no clear and unequivocal errors on the part of the adjudicator in arriving at the first adjudication decision, dismissed ASM's applications for stay and allowed Econpile's application to enforce the first adjudication decision. In relation to the second adjudication decision before a different High Court, the judge dismissed ASM's setting aside application and allowed Econpile's enforcement application. Three appeals were filed to the Court of Appeal: (i) Appeal 2363 was ASM's appeal against the dismissal of ASM's first setting aside application to set aside the first adjudication decision pursuant to s. 15 of the CIPAA; (ii) Appeal 2364 was ASM's appeal against the decision of the High Court in allowing Econpile's enforcement application to enforce the first adjudication decision pursuant to s. 28 of the CIPAA; and (iii) Appeal 2365 was ASM's appeal against the dismissal of ASM's first stay application to stay the first adjudication decision pursuant to s. 16 of the CIPAA. The Court of Appeal dismissed Appeals 2363 and 2364 but allowed Appeal 2365, thus setting aside the High Court order and granted the stay of the adjudication decision even after an enforcement order under s. 28 of the CIPAA had been granted. However, in respect of the High Court decision that decided the second stay application, a different panel of the Court of Appeal affirmed the High Court decision that

had dismissed the application for stay. This was Appeal No. 02(f)-34-05-2023(W). Based on the financial documents, the Court of Appeal concluded that Econpile was in a healthy financial position and would be able to pay ASM in the event ASM was successful in the arbitration. In Appeal No. 02(f)-2-0-2023(W), the questions for this court's determination were: (i) whether an adjudication decision, after having been enforced pursuant to s. 28 of the CIPAA as an order of the court, could be stayed pursuant to s. 16(1)(b) of the CIPAA ('question 1'); (ii) whether the Court of Appeal in so deciding to allow the stay application pursuant to s. 16(1)(b) of the CIPAA had overruled or disagreed, or gone beyond the *ratio decidendi* of the Federal Court decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd ('View Esteem')* ('question 2'). The questions of law in Appeal No. 02(f)-34-05-2023(W), were, *inter alia*: (i) was the 'financial capacity to repay test' the determinative criteria in considering an application for stay pursuant to s. 16 of the CIPAA in view of the liberalised interpretation on the ground of 'justice of the case' by the Federal Court in *View Esteem*; and (ii) could a court hearing an application for stay of a subsequent adjudication decision (arising out of the same construction contract, subject matters, issues and parties) refuse a statutory stay . The main focus for determination was whether the existence of a valid enforcement order made pursuant to s. 28 of the CIPAA precluded the making of an order pursuant to s. 16(1) of the same Act.

Held (allowing Appeal No. 02(f)-2-01-2023; dismissing Appeal No. 02(f)-34-05-2023(W))

Per Hasnah Mohammed Hashim FCJ delivering the judgment of the court:

(1) CIPAA is a legislation crafted to address issues common in the construction industry in particular relating to cash flow problems for the unpaid party and only as a temporary finality to the payment claims. It is not the end of the end. The Act was designed with the ultimate aim to assist the parties in a construction dispute to be paid expeditiously for the work which they had carried out and for adjudication proceedings for payment claims that are due and payable before the determination of the contract. Under the statutory framework of CIPAA, an adjudication decision could only be set aside in very rare circumstances to give effect to the provisional resolution of payment disputes in construction contracts. In the appeals herein, both the adjudication decision were not set aside and remained intact. Thus, in the absence of any error by the adjudicator, the High Court had correctly granted an enforcement order. (paras 42-44)

(2) In the construction and interpretation of a statute, the intent and object of the legislation is an important factor which the court could not ignore. Therefore, the correct approach under the CIPAA was to uphold an adjudicator's decision unless there were issues relating to jurisdiction or there had been a serious breach of natural justice. The adjudicators' decisions were binding on the parties until reversed by a court. Thus,

A the only defence to enforceability was if the findings offended the principle of natural justice or if the adjudicator lacked jurisdiction and, on that basis, the decision was set aside. In respect to the provisions under CIPAA to set aside an adjudication decision and to enforce the adjudication decision, there was no ambiguity. There was no provision
B for a stay of adjudication decision after an enforcement order was given. Applying the principles of interpretation of statues, in the absence of a specific provision, the court was not statutorily empowered to grant a stay if the adjudication decision was not set aside. To do so would be incongruent to the intent and purpose of CIPAA. (paras 47 & 48)

C **(3)** By interpreting the CIPAA in the manner it had done, the Court of Appeal in Appeal No. 02(f)-2-01-2023(W) had acted in excess of its jurisdiction under the Act by granting the stay when the adjudication decision remained intact and not set aside. The parties to the adjudication had no option but to comply with the orders of the
D adjudication decision unless and only unless it had been set aside under s. 16 of the CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of the CIPAA. Thus, in Appeal No. 02(f)-2-01-2023, question 1 was answered in the negative, in that an adjudication decision, after having been enforced pursuant to s. 28 of the
E CIPAA as an order of the court, could not be stayed pursuant to s. 16(1)(b) of the CIPAA. Question 2 was answered in the affirmative. (paras 49-50)

(4) The principles enunciated by this court in *View Esteem* must be followed in an application for a stay of an adjudication decision pursuant to s. 16
F of the CIPAA if an application to set aside the adjudication decision under s. 15 of the same Act had been made or the subject matter of the adjudication decision was pending final determination by arbitration or the court. In a construction dispute under CIPAA, the court must at all times consider all factors and issues subject to the provisions of CIPAA.
G With the reasons above, it was unnecessary to answer the questions posed in Appeal No. 02(f)-34-05-2023(W). (paras 51 & 52)

Bahasa Melayu *Headnotes*

Rayuan-rayuan ini menimbulkan persoalan kepentingan berkaitan
H permohonan untuk penangguhan bawah s. 16 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA') khususnya sama ada penangguhan boleh diberikan bawah s. 16(1)(b) CIPAA selepas keputusan adjudikasi dikuatkuasakan bawah s. 28 CIPAA sebagai perintah mahkamah. Melalui surat award, ASM Development (KL) Sdn Bhd ('ASM') melantik Econpile (M) Sdn Bhd sebagai kontraktor utamanya untuk menjalankan
I kerja-kerja projek ('projek') dengan jumlah kontrak RM280 juta. Econpile memulakan kerja dan menyerahkan 27 tuntutan kemajuan kepada ASM

berkenaan dengan kerja-kerja yang dilakukan. ASM menegaskan bahawa Econpile gagal melaksanakan kerja-kerja mereka dengan tekun mengikut syarat kontrak yang mengakibatkan kelewatan dalam menyiapkan projek itu. Arkitek yang terlibat dalam projek itu mengeluarkan sijil tidak siap kepada Econpile yang memberitahu pengenaan ganti rugi tertentu. Pertikaian timbul antara pihak-pihak yang mengakibatkan Econpile memulakan prosiding adjudikasi terhadap ASM yang menuntut penilaian interim nos. 16 hingga 24 yang tidak disahkan dan dakwaan kurang pensijilan penilaian interim no. 15. Pembayaran sebahagian telah dibuat untuk sijil pembayaran interim no. 15, dan tiada sijil dikeluarkan untuk tuntutan kemajuan nos. 16 hingga 24. Econpile kemudiannya memulakan adjudikasi bawah CIPAA untuk menuntut jumlah bawah tuntutan kemajuan nos. 16 hingga 24, serta jumlah yang kurang diperakui bawah pembayaran interim no. 15, dan tiada sijil dikeluarkan untuk tuntutan kemajuan nos. 16 hingga 24. Econpile kemudiannya memulakan adjudikasi bawah CIPAA untuk menuntut jumlah bawah tuntutan kemajuan no. 16 hingga 24, serta jumlah yang kurang diperakui bawah sijil pembayaran interim no. 15. ASM membuat tuntutan balas. Econpile pada masa yang sama memulakan prosiding timbang tara melalui notis timbang tara. ASM mempertikaikan jumlah yang dituntut dalam notis tersebut dan seterusnya mengeluarkan notis timbang taranya. Dengan keputusan adjudikasi dan keputusan adjudikasi tambahan ('keputusan adjudikasi pertama'), adjudikator memutuskan bahawa ASM perlu membayar Econpile jumlah RM59,767,269.32 ('jumlah yang diadjudikasi'). Malangnya, ASM gagal membayar jumlah penghakiman tersebut yang kemudiannya menyebabkan Econpile mengeluarkan tuntutan berkanun menurut s. 466(1) Akta Syarikat 2016. Econpile memfailkan notis permohonan ('OS 113') untuk menguatkuasakan keputusan adjudikasi menurut s. 28 CIPAA ('permohonan penguatkuasaan pertama'). ASM bertindak balas dengan memfailkan dua permohonan: (i) dalam OS 118, permohonan untuk mengetepikan keputusan adjudikasi tersebut bawah s. 15(b) dan (d) CIPAA atas dasar bahawa terdapat pelanggaran keadilan semula jadi dan bahawa mahkamah telah bertindak melebihi bidang kuasanya ('permohonan pengenepian pertama'); dan (ii) dalam OS 173, permohonan untuk mengekalkan keputusan adjudikasi sementara menunggu kesimpulan timbang tara atas dasar bahawa terdapat kesilapan yang jelas dan tidak berbelah bahagi dalam keputusan adjudikasi kerana pihak-pihak telah merujuk pertikaian kepada timbang tara. ASM menegaskan bahawa terdapat tuntutan menolak-selesai yang tulen dan sah dalam tuntutan balas mereka sebanyak RM276,581,893.96 terhadap Econpile dalam prosiding timbang tara, yang melebihi jumlah penghakiman sebanyak RM59,767,269.32 ('permohonan pergantungan pertama'). Berkenaan dengan keputusan adjudikasi pertama, tiga permohonan telah didengar bersama di hadapan Mahkamah Tinggi, OS 113, OS 118 dan OS 173. Mahkamah Tinggi, dalam mendapati bahawa tidak ada kesilapan yang jelas dan tidak berbelah bahagi

di pihak adjudikator apabila mencapai keputusan adjudikasi pertama, menolak permohonan ASM untuk penangguhan dan membenarkan permohonan Econpile untuk menguatkuasakan keputusan adjudikasi pertama. Berhubung dengan keputusan adjudikasi kedua di hadapan Mahkamah Tinggi yang berbeza, hakim menolak permohonan pengetepian ASM dan membenarkan permohonan penguatkuasaan Econpile. Tiga rayuan telah difailkan kepada Mahkamah Rayuan: (i) Rayuan 2363 ialah rayuan ASM terhadap penolakan permohonan pengenepian ASM yang pertama untuk mengetepikan keputusan adjudikasi pertama menurut s. 15 CIPAA; (ii) Rayuan 2364 adalah rayuan ASM terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan penguatkuasaan Econpile untuk menguatkuasakan keputusan adjudikasi pertama menurut s. 28 CIPAA; dan (iii) Rayuan 2365 ialah rayuan ASM terhadap penolakan permohonan penangguhan pertama ASM untuk menangguhkan keputusan adjudikasi pertama menurut s. 16 CIPAA. Mahkamah Rayuan menolak Rayuan 2363 dan 2364 tetapi membenarkan Rayuan 2365, sekaligus mengetepikan perintah Mahkamah Tinggi dan membenarkan penangguhan keputusan adjudikasi walaupun selepas perintah penguatkuasaan bawah s. 28 CIPAA telah diberikan. Bagaimanapun, berkenaan dengan keputusan Mahkamah Tinggi yang memutuskan permohonan penangguhan kedua, panel Mahkamah Rayuan yang berbeza mengesahkan keputusan Mahkamah Tinggi yang telah menolak permohonan penangguhan itu. Ini adalah Rayuan No. 02(f)-34-05-2023(W). Berdasarkan dokumen kewangan, Mahkamah Rayuan membuat kesimpulan bahawa Econpile berada dalam kedudukan kewangan yang sihat dan akan dapat membayar ASM sekiranya ASM berjaya dalam timbang tara. Dalam Rayuan No. 02(f)-2-01-2023(W), soalan untuk penentuan mahkamah ini ialah: (i) sama ada keputusan adjudikasi, selepas dikuatkuasakan menurut s. 28 CIPAA sebagai perintah mahkamah, boleh ditangguhkan menurut s. 16(1)(b) CIPAA ('soalan 1'); (ii) sama ada Mahkamah Rayuan dalam membuat keputusan untuk membenarkan permohonan penangguhan itu menurut s. 16(1)(b) CIPAA telah menolak atau tidak bersetuju, atau melampaui *ratio decidendi* keputusan Mahkamah Persekutuan dalam *View Esteem Sdn Bhd lwn. Bina Puri Holdings Sdn Bhd ('View Esteem'*) ('soalan 2'). Persoalan undang-undang dalam Rayuan No. 02(f)-34-05-2023(W), ialah, antara lain: (i) sama ada kapasiti 'financial capacity to repay test' kriteria penentu dalam mempertimbangkan permohonan untuk penangguhan menurut s. 16 CIPAA memandangkan tafsiran yang diliberalisasikan atas alasan 'justice of the case' oleh Mahkamah Persekutuan dalam *View Esteem* ('soalan 3'); dan (ii) bolehkah mahkamah mendengar permohonan untuk penangguhan keputusan adjudikasi berikutnya (yang timbul daripada kontrak pembinaan, perkara-perkara, isu dan pihak yang sama) menolak penangguhan berkanun ('soalan 4'). Soalan utama untuk penentuan adalah sama ada kewujudan perintah penguatkuasaan sah yang dibuat menurut s. 28 CIPAA menghalang pembuatan perintah menurut s. 16(1) Akta yang sama.

Diputuskan (membenarkan Rayuan No. 02(f)-2-01-2023(W); menolak Rayuan No. 02(f)-34-05-2023(W)
Oleh Hasnah Mohammed Hashim HMP menyampaikan penghakiman mahkamah:

(1) CIPAA ialah perundangan yang dirangka untuk menangani isu-isu biasa dalam industri pembinaan khususnya yang berkaitan dengan masalah aliran tunai bagi pihak yang tidak dibayar dan hanya sebagai keputusan muktamad sementara kepada tuntutan pembayaran. Ini bukan penamat. Akta ini digubal dengan tujuan utama untuk membantu pihak-pihak dalam pertikaian pembinaan dibayar dengan cepat untuk kerja-kerja yang telah mereka lakukan dan untuk prosiding adjudikasi bagi tuntutan pembayaran yang perlu dibayar sebelum penentuan kontrak. Di bawah rangka kerja berkanun CIPAA, keputusan adjudikasi hanya boleh diketepikan dalam keadaan yang sangat jarang berlaku untuk memberi kesan kepada penyelesaian sementara pertikaian pembayaran dalam kontrak pembinaan. Dalam rayuan ini, kedua-dua keputusan adjudikasi tidak diketepikan dan kekal utuh. Oleh itu, jika tiada sebarang kesilapan oleh adjudikator, Mahkamah Tinggi telah memberikan perintah penguatkuasaan dengan betul.

(2) Dalam pembinaan dan tafsiran statut, niat dan objek perundangan adalah faktor penting yang tidak boleh diabaikan oleh mahkamah. Oleh itu, pendekatan yang betul di bawah CIPAA adalah untuk mengekalkan keputusan adjudikator melainkan terdapat isu yang berkaitan dengan bidang kuasa atau terdapat pelanggaran serius keadilan semula jadi. Keputusan adjudikator mengikat pihak-pihak sehingga diakas oleh mahkamah. Oleh itu, satu-satunya pembelaan terhadap kebolehkuatkuasaan adalah jika penemuan itu mengacau prinsip keadilan semula jadi atau jika adjudikator tidak mempunyai bidang kuasa dan, atas dasar itu, keputusan itu diketepikan. Berkenaan dengan peruntukan bawah CIPAA untuk mengetepikan keputusan adjudikasi dan untuk menguatkuasakan keputusan adjudikasi, tidak ada kekaburan. Tiada peruntukan untuk penangguhan keputusan adjudikasi selepas perintah penguatkuasaan diberikan. Mengguna pakai prinsip tafsiran statut, jika tiada peruntukan tertentu, mahkamah tidak diberi kuasa secara undang-undang untuk membenarkan penangguhan jika keputusan adjudikasi tidak diketepikan. Untuk berbuat demikian adalah tidak selaras dengan niat dan tujuan CIPAA.

(3) Dengan mentafsir CIPAA mengikut cara yang telah dilakukannya, Mahkamah Rayuan dalam Rayuan No. 02(f)-2-01-2023(W) telah bertindak melebihi bidang kuasanya di bawah Akta dengan membenarkan penangguhan apabila keputusan adjudikasi kekal utuh dan tidak diketepikan. Pihak-pihak yang membuat penghakiman tidak mempunyai pilihan selain mematuhi perintah keputusan adjudikasi melainkan dan hanya melainkan ia telah diketepikan bawah s. 16

A CIPAA. Sebarang tafsiran lain akan mengalahkan tujuan, objek dan niat CIPAA. Oleh itu, dalam Rayuan No. 02(f)-2-01-2023(W), soalan 1 dijawab secara negatif iaitu, keputusan adjudikasi selepas dikuat kuasakan menurut s. 28 CIPAA sebagai perintah mahkamah tidak boleh ditangguhkan menurut s. 16(1)(b) CIPAA. Soalan 2 telah dijawab secara
B afirmatif.

(4) Prinsip yang dinyatakan oleh mahkamah ini dalam *View Esteem* mesti diikuti dalam permohonan untuk penangguhan keputusan adjudikasi menurut s. 16 CIPAA jika permohonan untuk mengetepikan keputusan adjudikasi di bawah s. 15 Akta yang sama telah dibuat atau subjek
C perkara keputusan adjudikasi sedang menunggu penentuan muktamad oleh timbang tara atau mahkamah. Dalam pertikaian pembinaan bawah CIPAA, mahkamah mesti pada setiap masa mempertimbangkan semua faktor dan isu yang tertakluk kepada peruntukan CIPAA. Dengan alasan di atas, adalah tidak perlu untuk menjawab soalan yang dikemukakan
D dalam Rayuan No. 02(f)-34-05-2023(W).

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] CLJU 1522; [2016] 1 LNS 1522 CA ***(refd)***

ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals [2023] 1 CLJ
E *1 CA* ***(refd)***

ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals [2023] 7 CLJ 374 CA ***(refd)***

Hong Leong Bank Bhd v. Khairulnizam Jamaludin [2016] 7 CLJ 335 FC ***(refd)***

Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 2 CLJ 229 CA ***(refd)***

IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd [2020] CLJU 1093; [2020] 1 LNS 1093
F *CA* ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Another Appeal [2018] 1 CLJU 2078; [2018] 1 LNS 2078 CA ***(refd)***

Tan Kah Fatt & Anor v. Tan Ying [2023] 2 CLJ 169 FC ***(refd)***

G *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC* ***(refd)***

Legislation referred to:

Companies Act 2016, s. 466(1)

Construction Industry Payment and Adjudication Act 2012, ss. 12, 15(b), (d) 16(1)(a), (b), (2), 28

H Interpretation Acts 1948 and 1967, s. 17A

(Civil Appeal No: 02(f)-2-01-2023(W))

For the appellant - Malik Imtiaz Sarwar, Arthur Wang Ming Way, Lam Wai Loon, Serene Hiew Mun Yi, Pan Yan Teng & Lim Ren Wei; M/s Harold & Lam Partnership

For the respondent - Cyrus Das, Edwin Lim & Ng Sim Hong; M/s Edwin Lim & Suren

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(Civil Appeal No: 02(f)-34-05-2023(W))
For the appellant - Cyrus Das, Edwin Lim & Ng Sim Hong; M/s Edwin Lim & Suren
For the respondent - Malik Imtiaz Sarwar, Arthur Wang Ming Way, Lam Wai Loon, Serene Hiew Mun Yi, Pan Yan Teng & Lim Ren Wei; M/s Harold & Lam Partnership

[Editor's note: For the Court of Appeal judgment, please see ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals [2023] 1 CLJ 1 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hasnah Mohammed Hashim FCJ:

[1] The appeals before us raised questions of significance relating to an application for a stay under s. 16 of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) in particular whether a stay can be granted under s. 16(1)(b) of the CIPAA after the adjudication decision is enforced under s. 28 of the CIPAA as an order of the court.

[2] In Appeal No. 02(f)-2-01/2023(W), the questions for this court's determination are as follows:

Question 1

Whether an adjudication decision, after having been enforced pursuant to s. 28 of the CIPAA 2012 as an order of the court can be stayed pursuant to s. 16(1)(b) of the CIPAA 2012.

Question 2

Whether the Court of Appeal in so deciding to allow the stay application pursuant to s. 16(1)(b) of the CIPAA 2012 has overruled or disagreed, or gone beyond the *ratio decidendi* of the Federal Court decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22.

[3] The questions of law in Appeal No. 02(f)-34-05/2023(W) are as follows:

(i) is the 'financial capacity to repay' test the determinative criteria in considering an application for stay pursuant to s. 16 of the Construction Industry Payment And Adjudication Act 2012 ("CIPAA"), in view of the liberalised interpretation on the ground of "justice of the case" by the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22; in light of the conflicting decisions by the Court of Appeal in *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals* [2023] 1 CLJ 1; [2022] 6 MLJ 392 and *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals* [2023] 7 CLJ 374 (Civil Appeal No. W-02(C)(A)-443-03/2021)?

A (ii) in a construction dispute where more than one CIPAA claim/award is made in respect of the same construction contract, subject matter, issues and parties, and the court has upon a wholesome assessment of all factors affecting the same construction contract, subject matter, issues and parties, granted a statutory stay of the first CIPAA adjudication B decision pursuant to s. 16 of the CIPAA, can a court hearing an application for stay of a subsequent adjudication decision (arising out the same construction contract, subject matter, issues and parties) refuse the statutory stay?

(iii) if the above question is answered in the affirmative, is the subsequent C court entitled to refuse the grant of a statutory stay by arriving at contradictory conclusions in the assessment of the same factors affecting the same construction contract, subject matter, issues and parties?

The Factual Background

D **[4]** To appreciate and understand the issues argued before us, it is necessary to set out the material facts. By a letter of award dated 26 September 2016 ASM Development (KL) Sdn Bhd (ASM), the plaintiff in the High Court appointed Econpile (M) Sdn Bhd (Econpile) as its main contractor to carry out work package 1: diaphragm wall, contiguous bored E pile, earthworks, piling works and basement structure works (basement 2 to LG1) for a project known as "Cadangan Pembangunan Bercampur 69 Tingkat Yang Mengandungi 7 Blok Pangsapuri Servis (4214 Unit), iaitu: Blok A - 58 Tingkat (678 Unit), Blok B - 58 Tingkat (618 Unit), Blok C - 58 Tingkat (560 Unit), Blok D - 58 Tingkat (678 Unit), Blok E - 58 Tingkat (618 Unit), Biok G - 58 Tingkat (502 Unit), 8 Tingkat Podium Tempat Letak F Kereta, 7 Tingkat Ruang Perniagaan (Aras 1 - 7), 1 Tingkat Aras Kemudahan (Aras 9), 4 Tingkat Tempat Letak Kereta (Aras LG1, basement 2 & basement 1) Di Atas Lot 36190, Mukim Petaling Kuala Lumpur" (the project) for contract sum of RM280 million. Econpile commenced works and submitted 27 progress claims to ASM in respect of the works G done. The progress claims were duly valued by the project quantity surveyor, and endorsed by Arkitek L2CA Sdn Bhd, the architect for the project.

[5] ASM contended that Econpile failed to perform their work diligently according to the terms of the contract which resulted in delays and the completion of the project even with the extended completion date of 7 April H 2018.

[6] The architect involved in the project issued a certificate of non-completion (CNC) dated 7 April 2018 to Econpile, notifying of the imposition of the liquidated damages. Dispute arose between the parties, resulting in Econpile commencing adjudication proceedings against the I ASM, claiming for the uncertified interim valuations nos. 16 to 24 and

alleged under-certification of interim valuation no. 15. Partial payment was made, for Interim Payment Certificate No. 15, and no certificates were issued for progress claims Nos. 16 to 24. Econpile then initiated adjudication under the CIPAA to claim the sums under progress claims nos. 16 to 24, as well as the under-certified sum under interim payment certificate no. 15. ASM made a cross-claim.

[7] Econpile simultaneously commenced arbitration proceedings by way of a notice of arbitration dated 18 March 2019. ASM disputed the sums claimed in the said notice and subsequently, issued its notice of arbitration dated 17 May 2019.

[8] By the adjudication decision dated 21 June 2019 and a supplementary adjudication decision dated 7 August 2019 (first adjudication decision), the adjudicator decided that ASM was to pay Econpile RM59,767,269.32 (the adjudicated sum). Unfortunately, ASM failed to pay the said adjudicated sum which subsequently led to Econpile issuing a statutory demand pursuant to s. 466(1) of the Companies Act 2016 on 25 June 2019. ASM then applied for a *Fortuna* injunction on 9 July 2019 to restrain Econpile from presenting a winding-up petition. The High Court granted the *Fortuna* injunction on 9 January 2020. Econpile appealed to the Court of Appeal in Civil Appeal No. W-02(NCC)(A)-192-02/2020. However, the appeal was subsequently withdrawn on 18 May 2022.

[9] Econpile filed a notice of application (Originating Summons No. WA-24C-113-07/2019) (OS 113) to enforce the first adjudication decision pursuant to s. 28 of the CIPAA (first enforcement application). ASM responded by filing two applications as follows:

(i) in OS No. WA-24C-118-07/2019 (OS 118), an application to set aside the said adjudication decision under ss. 15(b) and (d) of the CIPAA on the basis that there has been a denial of natural justice and that the adjudicator has acted in excess of his jurisdiction (first setting aside application); and

(ii) in OS No. WA-24C-173-09/2019 (OS 173), an application to stay the adjudication decision pending the conclusion of the arbitration on the basis that there were clear and unequivocal errors in the adjudication decision as the parties have referred the disputes to arbitration. ASM contended that there is a genuine and valid set-off in their counterclaim of RM276,581,893.96 against Econpile in the arbitration proceeding, which exceeds the adjudicated amount of RM59,767,269.32 (first stay application).

[10] The High Court allowed the first enforcement application by Econpile on 29 November 2019 and ordered ASM to pay Econpile the adjudicated sum of RM59,767,269.32, legal fees of RM150,000 and adjudication cost amounting to RM203,924.40 (first enforcement order). At the same time, the

A High Court dismissed ASM's first setting aside application and first stay application. Aggrieved with the decision of the High Court, ASM then appealed to the Court of Appeal. On 26 April 2022, the Court of Appeal dismissed the appeal against the first enforcement order and the setting aside application. However, on the same date, the Court of Appeal granted ASM
B the first stay application. ASM did not seek leave to appeal against the Court of Appeal's decisions in respect of the first enforcement order and the first setting aside application. On 3 January 2022, Econpile was granted leave to appeal against the decision of the Court of Appeal in the first stay application.

[11] Econpile initiated a further adjudication proceeding in respect of
C progress claims Nos. 25 to 27. On 17 September 2019, the adjudicator decided that ASM pay Econpile the sum of RM5,959,024.99 (second adjudication decision). However, ASM failed to make payment of the said adjudicated sum to Econpile.

[12] Econpile applied to enforce the second adjudication decision pursuant
D to s. 28 of the CIPAA, which was allowed by the High Court on 28 October 2020 (second enforcement order). ASM had filed an application to set aside the second adjudication decision (second setting aside application) which was dismissed by the High Court on the same date. On 4 February 2021, ASM's application to stay the second adjudication decision was dismissed by the
E High Court (second stay application). ASM then appealed to the Court of Appeal against both decisions of the High Court dated 28 October 2020 and 4 February 2021. On 28 October 2022, the Court of Appeal dismissed ASM's appeal against the second enforcement order and the second setting aside application. ASM did not seek leave to appeal against these Court of
F Appeal's decisions. However, on 25 November 2022, a different panel of the Court of Appeal dismissed ASM's appeal against the second stay application.

The High Court

[13] There are two High Court decisions on appeal relating to the stay of
G the first adjudication decision and the second adjudication decision (collectively referred to as 'the adjudication decision').

[14] In respect of the first adjudication decision (Appeal No. 02(f)-2-01/2023(W)), three applications were heard together before the High Court, OS 113, OS 118 and OS 173.

H **[15]** The High Court dismissed ASM's applications for stay and allowed Econpile's application to enforce the first adjudication decision. The High Court concluded that there was no basis to warrant a stay of the first adjudication decision. The fact that ASM has a claim which exceeds Econpile's payment claim pending in arbitration cannot be regarded as being
I a special circumstance unless it can be shown that there is a real danger that Econpile would not be able to pay ASM, which ASM failed to do so.

[16] The learned High Court Judge found that there were no clear and unequivocal errors on the part of the learned adjudicator in arriving at the said first adjudication decision. The High Court was of the opinion that ASM failed to adduce sufficient evidence to persuade the High Court to grant an order for a stay of the said first adjudication decision. Further, ASM has not provided cogent reasons why a stay is warranted to meet the justice of the case or that the discretion ought to be exercised in ASM's favour. The High Court concluded that this case falls within the category of cases where the dissatisfied party in an adjudication decision ought to be made to pay the adjudicated amount that is due first while the dispute at hand is resolved in another forum, in this instance, the pending arbitration.

[17] In Originating Summons No. WA-24C-252-11/2019 which relates to the second adjudication decision (Appeal No. 02(f)-34-05/2023(W)) before a different High Court, the judge on 28 October 2020 had also dismissed ASM's setting aside application and allowed Econpile enforcement application.

[18] The High Court Judge found that since both parties are in concurrence that arbitration proceedings are ongoing in respect of the dispute, ASM has surmounted the stay threshold requirement as provided under s. 16(1)(b) of the CIPAA. There are neither instances of disregarding nor wrong interpretation of statute or misreading and/or application of case authorities that resulted in the adjudication decision as being erroneous and there are no unequivocal errors to justify the stay.

The Court Of Appeal

[19] In relation to the High Court decision dated 29 November 2019, there are three appeals filed at the Court of Appeal:

(i) W-02(C)(A)-2363-12/2019 (2363) which is ASM's appeal against the dismissal of ASM's first setting aside application to set aside the first adjudication decision pursuant to s. 15 of the CIPAA 2012;

(ii) W-02(C)(A)-2364-12/2019 (2364) is ASM's appeal against the decision of the High Court in allowing Econpile's enforcement application to enforce the first adjudication decision pursuant to s. 28 of the CIPAA 2012; and

(iii) W-02(C)(A)-2365-12/2019 (2365) is ASM's appeal against the dismissal of ASM's first stay application to stay the first adjudication decision pursuant to s. 16 of the CIPAA 2012.

[20] On 26 April 2022, the Court of Appeal unanimously dismissed Appeals 2363 and 2364 with costs of RM10,000 for each appeal subject to allocatur. The Court of Appeal allowed Appeal 2365, thus setting aside the High Court order dated 29 November 2019 and granted the stay of the adjudication decision even after an enforcement order under s. 28 of the CIPAA has been granted.

[21] However, in respect of the High Court decision dated 4 February 2021 that decided the second stay application, a different panel of the Court of Appeal affirmed the High Court decision that had dismissed the application for stay. This is the Appeal No. 02(f)-34-05/2023(W). The Court of Appeal, through the grounds of judgment of Abu Bakar Jais JCA (as he then was), said:

> [47] The cases above, demonstrate that it is quite a task for an applicant in his application for a stay of the adjudication decision. Although there can be no doubt the stay of an adjudication decision can be allowed, the cases highlighted above laid down serious requirements for the same to succeed. These conditions can be summarised as follows:
>
> (a) there are only two grounds to support the application of a stay of the adjudication decision;
>
> (b) the two grounds as explained, must be stringently complied;
>
> (c) In respect of the first ground, there must not be just a simple error but clear error on the part of the adjudicator in respect of his adjudication decision;
>
> (d) the clear error must be grave to prick the conscience of the court hearing the application to stay the adjudication decision;
>
> (e) the adjudicator's decision must be upheld even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of evidence before him and;
>
> (f) the court is not to look into or review the merits of the case or to decide the facts of the case

[22] Based on the financial documents before it, the Court of Appeal concluded that Econpile is in a healthy financial position and will be able to pay ASM in the event ASM is successful in the arbitration. Further, the adjudicator had not made clear errors in his adjudication decision.

Legislative Framework

[23] Before addressing the various questions raised, it is necessary to consider the relevant statutory provisions which are in issue in this appeal before us.

[24] The CIPAA is a legislation designed to ensure regular and timely payment as well as promote a speedy and cost-effective dispute resolution mechanism for disputes through adjudication involving payment in the construction industry. It advocates a system of pay first and settle dispute later.

[25] Section 12 of the CIPAA sets out the procedure that must be complied with in an adjudication:

> (1) The adjudicator shall conduct the adjudication in the manner the adjudicator considers appropriate within the powers provided under section 25.

(2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within:

(a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;

(b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or

(c) such further time as agreed to by the parties.

(3) An adjudication decision which is not made within the period specified in subsection (2) is void.

(4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

(5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.

(6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.

(7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's initiative or at the request of any party.

(8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7) and any correction made is deemed to take effect from the date of the original adjudication decision.

(9) The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act.

[26] Once an adjudication decision is pronounced, an aggrieved party may apply to set aside an adjudication decision under s. 15 of the CIPAA on the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially; or

(d) the adjudicator has acted in excess of his jurisdiction.

[27] Under the CIPAA, a party may apply to the High Court under s. 16(1) of the CIPAA for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under s. 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

[28] Section 16(2) of the CIPAA empowers the High Court to grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[29] Section 28 of the CIPAA provides that a party to the adjudication process may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court. The said section reads as follows:

> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under sub-s. (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

Analysis And Determination

[30] The main focus for determination is whether the existence of a valid enforcement order made pursuant to s. 28 of the CIPAA precluded the making of an order pursuant to s. 16(1) of the same Act.

[31] The Court of Appeal in Appeal 2365 allowed the stay application and granted an order pursuant to s. 16(b) of the CIPAA. In granting the stay after an enforcement order has been granted, the Court of Appeal reasoned that since there are no express prohibitions in the CIPAA prohibiting otherwise the court is empowered to grant a stay. The Court of Appeal opined that as long as the threshold under s. 16 of the CIPAA is met and supported with cogent evidence that there are special circumstances justifying the granting of a stay, an application for a stay can be considered and granted. In its grounds of judgment, the Court of Appeal further explained that an order for enforcement obtained pursuant to s. 28 of the CIPAA merely permits the adjudication decision to be enforced as a judgment of the court but is not a judgment in itself. A stay can be granted provided the threshold under s. 16 of the CIPAA is satisfied. The Court of Appeal further clarified that in any event, an adjudication decision is not merged into a judgment if an enforcement application is allowed under s. 28 of the CIPAA since an order obtained merely permits the adjudication decision to be enforced as a judgment of the court but is not a judgment in itself.

[32] The Court of Appeal explained that to be deserving of a stay, the appellant, in this case, ASM, must satisfy the requirements set out in s. 16(1)(a) and (b) of the CIPAA supported with cogent evidence that there

are special circumstances justifying the granting of a stay of the adjudication decisions even after an enforcement order has been granted. In its judgment, the Court of Appeal explained the reasons for its decision:

> [23] It is useful to observe that despite the enforcement order on the adjudication decision (which decision of the High Court we have affirmed on appeal) this is no objection to the granting of a stay on the same adjudication decision. **There are no express prohibitions in the CIPAA stating that stay applications cannot be allowed after the enforcement order has been granted**.
>
> [24] We thus reiterate that requests for stay can be made, and granted, provided the threshold under s. 16 is satisfied, and also that in any event an adjudication decision is not merged into a judgment if an enforcement application is allowed under s. 28 of the CIPAA, since an order obtained pursuant to s. 28 of the CIPAA merely permits the adjudication decision to be enforced as a judgment of the court but is not a judgment in itself (see *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] 1 LNS 1264; [2021] 1 AMR 594).
>
> [25] As such, in order to be deserving of a stay, the appellant must satisfy the requirements set out in s. 16(1)(a) and (b) of the CIPAA and to show with cogent evidence that there are special circumstances which justify the granting of a stay of the said adjudication decision.
>
> (emphasis added)

[33] With respect, we do not agree. The Court of Appeal in Appeal 2365 opined that since there is no express provision in the CIPAA prohibiting the granting of stay after the enforcement order has been granted, an application for stay can be considered and granted. The reasons of the Court of Appeal are seriously flawed.

[34] The Hansard is a useful tool to understand and appreciate the intention of the Parliament in legislating laws. The intention of the Parliament in legislating the CIPAA is explained in the Hansard Bil. 7 dated 7 May 2012 as follows:

> ... Buat masa ini, mekanisme yang diguna pakai bagi menyelesaikan pertikaian pembayaran adalah melalui tindakan Mahkamah dan prosiding timbang tara. Walau bagaimanapun, proses perbicaraan kes di Mahkamah lazimnya mengambil masa yang lama manakala prosiding timbang tara melibatkan kos yang tinggi. Prosiding timbang tara hanya boleh dimulakan dengan persetujuan pihak-pihak terlibat. Pada lazimnya perjanjian bertulis akan memperuntukkan bahawa timbang tara boleh dimulakan selepas kerja pembinaan siap atau kontrak ditamatkan. Tempoh masa yang lama dan kos prosiding yang tinggi adalah faktor utama yang mengekang kepada pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah dan timbang tara.
>
> Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan *2011 memberi satu opsyen kepada pihak-pihak terlibat menyelesaikan pertikaian dengan kos yang rendah dan cepat. Oleh yang demikian Jemaah Menteri dalam*

mesyuaratnya pada 15 Julai 2009 telah bersetuju agar suatu akta khusus digubal bagi menangani pembayaran dan membantu pihak-pihak dalam industri pembinaan untuk menyelesaikan pertikaian pembayaran.

(emphasis added)

[35] Section 17A of the Interpretation Acts 1948 and 1967 provides that in interpreting an Act, the construction promoting the purpose or object of the legislation shall be preferred:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[36] The Federal Court in *Hong Leong Bank Bhd v. Khairulnizam Jamaludin* [2016] 7 CLJ 335 laid down the basic principles to apply when interpreting statutes:

> [29] In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. Where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. In *Chin Choy & Ors v. Collector of Stamp Duties* [1978] CLJU 26; [1978] 1 LNS 26; [1979] 1 MLJ 69 at 70, the Federal Court said:
>
> > It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.
> >
> > It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed, per Bayley J. in *R v. Ramsgate (Inhabitants).*
>
> [30] In *Andrew Lee Slew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449 the Federal Court had this to say at pp. 457-458:
>
> > Section 17A of the Interpretation Act provides that:
> >
> > A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.
>
> On the proper application of the provision of the said s. 17A of the Interpretation Act we would refer to the case of *All Malayan Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, *inter alia*, as follows:

In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p. 566:

(1) Legislation is always to be understood first in accordance with its plain meaning;

(2) Where the plain meaning is in doubt the court will start the process of construction by attempting to discover from the provisions enacted, the broad purpose of the legislation;

(3) Where a particular reading advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

[37] David Wong Dak Wah, JCA as he then was, in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] CLJU 1522; [2016] 1 LNS 1522 explained the philosophy underlying CIPAA:

[15] ... Prior to the introduction of CIPAA 2012, claims by subcontractors against the main contractors were not able to be resolved in a speedy and economical manner. The only redress was to launch a suit in Court and then apply for summary judgments with the hope that the Courts would grant such summary judgments. Such applications invariably have difficulties as the threshold for such application to succeed is quite high as the subcontractor has to show that there are no triable issues for the Court to adjudicate or in short, the defence of the contractor has no merit at all. It cannot be disputed that this sort of litigation has given rise to financial hardship to the subcontractors so much so that some had lost all the benefits of the subcontracts. It also cannot be disputed that the contractors have taken advantage of the intricacies of the judicial system by withholding payments without valid reasons.

[16] To overcome the aforesaid shortcomings and with the aim of making the construction industry a fair playing field for the players, Parliament in various Commonwealth countries saw it fit to introduce an adjudication regime in which interim claims made by subcontractors can be dealt with by appointed adjudicators in a speedy and economical manner. The benefit of such regime is plain and obvious in that claims of subcontractors, being the lifeline of their survival, must not be delayed without valid reasons by the contractors. In short, the unnecessary stoppage of money flow would be avoided.

[38] The long title of CIPAA states that the process as provided under the Act is "to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters."

[39] In *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433 the Federal Court articulated through the judgment of Zawawi Salleh FCJ that the CIPAA is enacted by Parliament to provide a faster and cheaper resolution forum through the process of adjudication. The CIPAA was drafted with the said specific intent. The court's primary duty under the CIPAA must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator:

> [55] We have also perused and scrutinised the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling CIPAA Bill. We have no hesitation in agreeing and endorsing the interpretation expounded by the High Court and the majority, it is clear from the materials mentioned above that the primary objective of CIPAA 2012 is to alleviate cash flow issues by providing an effective and economical mechanism. The courts are consistent in the finding that CIPAA 2012 is intended to alleviate cash flow issue. Therefore, the mischief that CIPAA 2012 intends to cure is none other than the cash flow in the construction industry through effective and economical mechanism; for deciding otherwise would run counter to the legislative purpose of creating an expedited adjudication process.

[40] David Wong (JCA), as His Lordship then was, in *IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd* [2020] CLJU 1093; [2020] 1 LNS 1093 observed:

> The intention and objective of CIPAA is very clear. It was specifically enacted to address issues in the construction industry such as to alleviate cash flow problems for the unpaid party and to give a temporary finality to the payment claims. The Act was designed to assist the parties to be paid speedily for the work which they had carried out and for adjudication proceedings for payment claims that is due and payable before the determination of the contract.

[41] The Federal Court encapsulated the principles governing stay applications under the CIPAA through the judgment of Zulkefli Ahmad Makinudin PCA in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22:

> [76] The High Court in the present case held that an application under s. 16 of CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating "to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes".
>
> [77] The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the courts in England, Australia and Singapore. The court placed much emphasis on the decision of the Singapore Court of Appeal in *WY Steel Construction Pte Ltd*.

[78] The Court of Appeal in the present case adopted a similar approach. It said that unless there was "overwhelming evidence" that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.

[79] We are of the view that such a stringent test is not justified under CIPAA because s. 16 of CIPAA itself contains no such limiting requirement or intent. Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.

[80] It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part. It can be seen as follows:

(a) In England, statutory adjudication is governed by the HGCR Act and the Scheme and the Arbitration Act 1996. Under reg. 24 of the Scheme an order of the adjudicator may be enforced by reference to s. 42 of the UK Arbitration Act. At the application for enforcement, the responding party may seek to resist the enforcement on the grounds of want of jurisdiction of the adjudicator or a breach of natural justice.

(b) In Australia, different States have different statutory adjudication schemes, in the State of Victoria in Australia where there is a failure to respond to a payment claim, the claiming party must apply for leave to enter judgment at which point a court can review the claim. There is a provision for a court-based review of the adjudicator's decision. Apart from that, judicial review or *certiorari* is available to challenge any adjudication decision. This includes challenging an adjudication decision by using *Wednesbury* unreasonableness. Importantly, Victoria, Australia, provides for an automatic stay after an adjudication decision, on the launching of arbitration to challenge the award subject to security being provided by the responding party.

(c) In New Zealand, the scheme is again different under the Construction Contracts Act 2002. Here the claiming party is entitled to seek statutory adjudication on progress payment. Those progress payments are statutorily defined under s. 17 of the Act to include an accounting of defective works and liquidated ascertained damages. Once an adjudication decision is delivered, s. 73 of the Act sets out the steps for applying to court for judgment for enforcement of the award. This is apart from the right of the responding party to seek judicial review against the award.

(d) In Singapore, there is a specific provision under s. 18 of the S'pore Act 2006 which allows for review of adjudication awards. It is after the review process concludes that the claiming party must then apply to court for an order of enforcement.

A [81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those B decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. CIPAA contains no such restriction.

[82] We are in agreement with the contention of the appellant that a more liberal reading of s. 16 of CIPAA would allow some degree of flexibility C to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However, to restrict the application of s. 16 of CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

D **[42]** The CIPAA is a legislation crafted to address issues common in the construction industry in particular relating to cash flow problems for the unpaid party and only as temporary finality to the payment claims. It is not the end of the end. The Act was designed with the ultimate aim to assist the parties in construction dispute to be paid expeditiously for the work which E they had carried out and for adjudication proceedings for payment claims that are due and payable before the determination of the contract.

[43] Section 16 of the CIPAA expressly stipulates that a party in an adjudication dispute may apply to the High Court for a stay of an adjudication F decision in the following circumstances:

(i) if an application to set aside the adjudication decision under s. 15 has been made; or

(ii) if the subject matter of the adjudication decision is pending final determination by arbitration or the court.

G **[44]** Therefore, under the statutory framework of the CIPAA, an adjudication decision can only be set aside in very rare circumstances to give effect to the provisional resolution of payment disputes in construction contracts. In the appeals before us, both the adjudication decision were not set aside and remain intact. Thus, in the absence of any error by the H adjudicator, the High Court had correctly granted an enforcement order.

[45] In addressing the issue of enforcement of the adjudication decision, the Court of Appeal in *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229, observed that s. 28 of the CIPAA vests the High Court with I discretionary powers, however, an applicant is not required to show that there are no grounds for setting aside the adjudication decision under s. 15 of the same Act. If there is an adjudication decision, the applicant only needs

to satisfy the High Court that the adjudication decision was made in the applicant's favour and that there had been a failure by the respondent to pay the adjudicated sum by the date specified in the adjudication decision. That is all that is required by the statute.

[46] This court in *Tan Kah Fatt & Anor v. Tan Ying* [2023] 2 CLJ 169 explained that the courts must favour a construction which promotes the purpose, object or intent of the legislation over a construction. It must not be forgotten that even though adjudication under the scheme of CIPAA offers temporary finality to the resolution of the payment dispute, the subject matter of the adjudication decision can still be finally determined in arbitration or the court. It offers the parties in the payment dispute to 'pay now talk later'. The door is not shut. The option is still open to the parties to refer to arbitration to finally resolve the issue. As David Wong Dak Wah CJSS in the decision of the Court of Appeal in *Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Another Appeal* [2018] 1 CLJU 2078; [2018] 1 LNS 2078 explained:

> [20] ... This "temporary finality" nature serves only the purpose of keeping the cash flow going for the contractors so that they would not be held to ransom by recalcitrant employers.

[47] The authorities we have stated above resonated that in the construction and interpretation of a statute, the intent and object of the legislation is an important factor which the court cannot ignore. Therefore, the correct approach under the CIPAA is to uphold an adjudicator's decision unless there are issues relating to jurisdiction or there has been a serious breach of natural justice. The adjudicators' decisions are binding on the parties until reversed by a court. Thus, the only defence to enforceability is if the findings offended the principle of natural justice or if the adjudicator lacked jurisdiction and, on that basis, the decision is set aside.

[48] In respect to the provisions under the CIPAA to set aside an adjudication decision and to enforce the adjudication decision, we find no ambiguity. There is no provision for a stay of adjudication decision after an enforcement order is given. Applying the principles of interpretation of statutes as we have stated above, in the absence of a specific provision, the court is not statutorily empowered to grant a stay if the adjudication decision is not set aside. To do so would be incongruent to the intent and purpose of the CIPAA.

[49] Guided by the rules of statutory construction, and analysis of previous courts' decisions, we are of the opinion that by interpreting the CIPAA in the manner it had done, the Court of Appeal in Appeal No. 02(f)-2-01/2023(W) had acted in excess of its jurisdiction under the Act by granting the stay when the adjudication decision remained intact and not set aside. The

parties to the adjudication have no option but to comply with the orders of the adjudication decision unless and only unless it has been set aside under s. 16 of the CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of the CIPAA.

[50] Having carefully considered the submissions of all parties, we agreed with the decision of the High Courts. For the foregoing reasons, in Appeal No. 02(f)-2-01/2023(W), question 1 is answered in the negative that is, an adjudication decision after having been enforced pursuant to s. 28 of the CIPAA as an order of the court cannot be stayed pursuant to s. 16(1)(b) of the CIPAA. Question 2 is answered in the affirmative.

[51] It must be reiterated that the principles enunciated by this court in *View Esteem* must be followed in an application for a stay of an adjudication decision pursuant to s. 16 of the CIPAA if an application to set aside the adjudication decision under s. 15 of the same Act has been made or the subject matter of the adjudication decision is pending final determination by arbitration or the court. In a construction dispute under the CIPAA, the court must at all times consider all factors and issues subject to the provisions of the CIPAA.

[52] With the reasons we have given above, we find it unnecessary to answer the questions posed in Appeal No. 02(f)-34-05/2023(W).

Conclusion

[53] Based on the aforementioned reasons and in the light of the above settled principles, we found merits in the issues raised by the appellant (Econpile).

[54] Therefore, having carefully considered the submissions of all parties and for all the reasons aforesaid, we allowed the appeal in Appeal No. 02(f)-2-01/2023(W). We set aside the decision of the Court of Appeal and restored the decision of the High Court. In Appeal No. 02(f)-34-05/2023(W), we dismissed the appeal and affirmed the decision of the Court of Appeal and the High Court. A global cost of RM100,000 subject to allocatur is to be paid to the appellant in Appeal No. 02(f)-2-01/2023(W).